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IN THE

Supreme Court of the United States

BERNICE SOMMERS, AS EXECUTRIX OF THE ESTATE OF SHELDON CHARLES SOMMERS, DECEASED,

Petitioner,

v.

WENDY SOMMERS, MARY LEE SOMMERS GOSZ, and JULIE SOMMERS NEUMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court's authority to vacate an arbitration award on public policy grounds is subject to the procedural requirements of Sections 10 through 12 of the Federal Arbitration Act.

2. Whether an arbitration award, entered pursuant to the Federal Arbitration Act, may be vacated because it violates public policy, after the Court's decision in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Indiana Court of Appeals.

OPINIONS BELOW

The final judgment of the Superior Court of Marion County, Indiana, confirming and entering judgment on the arbitration award in favor of Respondents, is unpublished and reproduced at Pet. App. 8a-10a. The opinion of the Court of Appeals of Indiana, affirming the trial court, is reported at 898 N.E.2d 1234 (Ind. Ct. App. 2008) (Pet. App. 1a-7a). The Supreme Court of Indiana denied transfer of the appeal in an unpublished order that is reproduced at Pet. App. 19a-20a.

STATEMENT OF JURISDICTION

The Supreme Court of Indiana denied transfer of the appeal from the Court of Appeals of Indiana on April 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 9 U.S.C. § 9 provides, in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is

made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in *sections 10* and *11* of this title.

2. 9 U.S.C. § 10(a) provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

3. 9 U.S.C. § 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

4. 9 U.S.C. § 12 provides, in pertinent part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

STATEMENT OF THE CASE

This case involves a challenge to confirmation and enforcement of an arbitration award against Petitioner and in favor of Respondents ("Award"). The arbitration proceeding concerned the validity of certain transfers of valuable artwork by a prominent physician, Dr. Sheldon Charles Sommers, to Respondents, his nieces.[1] Dr. Sommers had sued Respondents, who were his attorneys-in-fact under powers of attorney, to invalidate the transfers purportedly made under gift agreements with each of them. The principal legal theory of recovery advanced in the complaint was that the alleged gifts were presumed to have been obtained by undue influence and were void under Indiana law.

Respondents moved to compel arbitration of Dr. Sommers' claims with respect to the artwork.[2] The artwork was held in Sommers Art Investors, LLC ("LLC"), formed ostensibly for gifting of the art to Respondents as part of Dr. Sommers' estate plan.[3] The operating agreement for the LLC contained an arbitration provision that required arbitration between the company's members pursuant to the Federal Arbitration Act.

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[1] Dr. Sommers passed away during the pendency of this action, and Petitioner, as personal representative of his estate, was substituted as the plaintiff.

[2] Dr. Sommers' lawsuit also sought to recover other property of his in Respondents' possession, but that claim was not submitted to arbitration and is not part of this appeal.

[3] Dr. Sommers and Respondents were the only members of the LLC.

Petitioner challenged the arbitrability of the undue influence claims on the basis that the operating agreement was procured by undue influence and was not an enforceable agreement to arbitrate. The trial court ordered the LLC artwork claims to arbitration.

The arbitrator awarded the artwork to Respondents and found that Dr. Sommers had made valid *inter vivos* gifts of the artwork[4] pursuant to written gift agreements with each Respondent. Dr. Sommers had signed each agreement in blank at a time when he was represented by counsel. After Dr. Sommers had discharged the law firm that prepared the gift agreements and hired a new estate planning attorney, former counsel filled in the blanks in the gift agreements without first notifying Dr. Sommers. The blanks that former counsel completed described both the gifts being made and their value. The arbitrator determined that Dr. Sommers' former counsel had either express or implied authority to complete the gift agreements on Dr. Sommers' behalf.

Respondents filed a motion with the trial court to confirm the Award. Petitioner opposed confirmation, asserting that the award violated public policy. Petitioner argued that the Award was fundamentally based on the arbitrator's improper conclusion that Dr. Sommers' former attorneys possessed authority, after their discharge, to fill in blanks in the purported gift documents for the artwork and bind Dr. Sommers to make the gifts. Under the Indiana Rules of Professional Conduct, Dr. Sommers' former counsel, as a discharged

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[4] Because the LLC held title to the artwork, the "gifts" were actually Dr. Sommers' ownership units in the LLC.

lawyer, no longer possessed any such authority. *See* Ind. Professional Conduct Rule 1.16; *Restatement (3rd) of the Law Governing Lawyers* § 33(2)(b) (2000) (following termination, lawyer must "take no action on behalf of a former client without new authorization"). According to Petitioner, because the Award enforced the alleged gift agreements, the Award validates a violation of Indiana's professional conduct rules and contravenes well-defined public policy governing the regulation of attorney conduct and the practice of law in the State of Indiana.

The trial confirmed and entered judgment on the Award despite Petitioner's public policy defense. On appeal, Petitioner challenged both the trial court's order compelling arbitration of the undue influence claims with respect to the artwork[5], and also argued that the arbitrator's award should have been vacated as a violation of Indiana public policy. The Court of Appeals of Indiana declined to reach the merits on either issue and held that both arguments were untimely and waived. According to the Court of Appeals, Petitioner waived the public policy challenge to the Award by waiting to raise that argument until Respondents sought confirmation of the Award. The Supreme Court of Indiana denied transfer of the appeal.

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[5] That issue is not being raised as grounds for the petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court first recognized the inherent power of a court to refuse to enforce an arbitration award that violates public policy in *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983). The Court later clarified and reaffirmed this public policy exception to the enforceability of an arbitration award in *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29 (1987).

The principal issue here is whether the Court's decision last year in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), means that a court cannot vacate an arbitration award unless one of the FAA Section 10 or 11 grounds are demonstrated in a timely petition to vacate filed under FAA Section 12. *Hall Street* dealt only with the substantive grounds for judicial review, and statutory exceptions to confirmation listed, under Section 10 and 11 of the FAA. *Hall Street* did not mention *W.R. Grace*, *Misco* or involve the public policy exception to confirmation of arbitration awards. The Indiana Court of Appeals relied upon *Hall Street* and also applied the procedural requirement in FAA Section 12 that a motion to review an award must be filed within three months.

However, the Court of Appeals failed to follow lower court decisions holding that a public policy challenge need not be raised in that manner. A court retains the power to refuse to enforce an arbitration award, at the time of confirmation, even absent a timely filed motion to vacate the award. *Hall Street* too left open the

possibility of "more searching review based on authority outside the statute" that is not exclusively provided by Sections 10 and 11. *Hall Street*, 128 S.Ct. at 1406.

A public policy challenge to an arbitration award, entered pursuant to the Federal Arbitration Act, remains a viable ground to vacate the award in accordance with prior decisions of this Court. The Court's opinion in *Hall Street* did not eliminate public policy as a basis to refuse to enforce an arbitration award. Courts can still vacate an arbitration award that violates a well-defined public policy. The decision of the Indiana Court of Appeals on this issue conflicts with this Court's decisions in *W.R. Grace* and *Misco*, and also ignores other precedent that permits a court to consider a public policy challenge at the time of confirmation of the award. In addition, the decision misapplies and improperly expands the holding in *Hall Street* beyond the narrow issue decided.

As demonstrated below, there are compelling reasons for this Court to grant this petition and accept review on a writ of certiorari. This Court should both clarify and reaffirm that public policy remains a valid ground to challenge an arbitration award after *Hall Street* that is not subject to the procedural requirements of Sections 10 through 12 of the FAA.

I. THE DECISION THAT PETITIONER WAIVED ITS PUBLIC POLICY CHALLENGE BY NOT RAISING IT IN A MOTION TO VACATE THE AWARD CONFLICTSWITH DECISIONS OF OTHER COURTS.

The Indiana Court of Appeals erred when it concluded that the trial court was required to confirm the Award because Petitioner failed to file a motion to vacate or correct the Award and demonstrate one of the grounds in Sections 10 or 11 of the FAA. *See Sommers v. Sommers*, 898 N.E.2d 1234, 1236 (Ind. Ct. App. 2008). Petitioner properly raised a public policy challenge to the Award prior to confirmation, and the Court of Appeals should have considered this challenge on the merits and determined whether the Award violates public policy.

Both circuit courts of appeal and district courts have held that despite a party's failure to raise and establish one of the statutory exceptions to confirmation stated in FAA Sections 10 or 11, before confirming the arbitration award the court must still consider whether the award violates public policy. *See Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1317 (6th Cir. 1988); *United Steelworks of America v. Roemer Indus.*, 68 F.Supp.2d 843, 847-48 (N.D. Ohio 1999); *Service Employees Int'l Union Local 36 v. City Cleaning Co.*, No. 91-1652, 1991 WL 268212, at * 2 (E.D. Pa. Nov. 22, 1991). Put another way, while defenses to the merits of an arbitration award must be raised in a motion to vacate the award, on confirmation the court must decide whether the award is unenforceable as

violating public policy. *See Professional Administrators Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 642-43 (6th Cir. 1989).

"A public policy challenge to an arbitration award need not have been previously asserted in a motion to vacate or modify the award." *Ohio Council 8, American Federation of State, County & Municipal Employees, AFL-CIO v. Trumbull Memorial Hosp.*, 124 F.Supp.2d 482, 486 n. 2 (N.D. Ohio 2000). Public policy is considered to be an exception to the rule that a court must confirm the arbitration award unless it is vacated, modified or corrected pursuant to a motion filed under Section 10 or 11 of the FAA. *Domino Group, Inc. v. Charlie Parker Memorial Foundation*, 985 F.2d 417, 420 n. 1 (8th Cir. 1993); *cf. School City of East Chicago, Ind. v. East Chicago Fed. of Teachers, Local # 511*, 422 N.E.2d 656, 662-63 (Ind. Ct. App. 1981) (applying Indiana arbitration statute).

The Indiana Court of Appeals wrongly decided that a public policy challenge to an arbitration award is treated the same as the statutory defenses to an award listed in Sections 10 and 11 of the FAA. The decision is based on the erroneous premise that all challenges to an arbitration award must be asserted in a motion to vacate or modify filed within the three-month time limit prescribed in FAA Section 12. The cases cited above are in direct conflict with the Indiana Court of Appeals' decision on this issue. A motion to vacate the award due to a violation of public policy is not required.

This public policy exception to confirmation of an arbitration award exists because the Court in

W.R. Grace recognized it. This ground for vacating an award is not a creature of statute under the Federal Arbitration Act that must be timely asserted or deemed waived.

The Court stated in *W.R. Grace* that a court may not enforce an arbitrator's interpretation of a contract that is contrary to public policy, and that the question of public policy is ultimately one for the courts. *W.R. Grace*, 461 U.S. at 766, 103 S.Ct. at 2183. This authority to refuse enforcement of an award is derived from the basic notion that "no court will lend its aid to one who founds a cause of action upon an immoral or illegal act." *Misco*, 484 U.S. at 42, 108 S.Ct. at 373. A court's refusal to enforce an arbitrator's award on public policy grounds is also justified on the principle that the judiciary should protect the public's interests in confining the scope of private agreements. *Id.*

Yet, the judiciary cannot be the proponent of the public's interests if the procedural requirements in Sections 10 through 12 of the FAA are applied to a public policy challenge to an arbitration award. The Indiana Court of Appeals refused to consider the merits of Petitioner's public policy argument based on waiver, but a public policy defense cannot be waived. *See Pharmaceutical Sales & Consulting Corp. v. J.W.S. Delavau Co.*, 106 F.Supp.2d 761, 767 (D.N.J. 2000). A court is free to consider public policy arguments *sua sponte* because it is in the interest of the public and the administration of justice. *Id.*

Here, Petitioner objected to confirmation of the Award and argued that the Award violated public policy.

The trial court nevertheless confirmed and entered judgment on the Award. The Indiana Court of Appeals incorrectly decided that Petitioner had raised the public policy challenge too late and was required to advance this argument in a motion filed under FAA Section 10 or 11.

Petitioner's public policy challenge to the Award should have been heard on the merits by the Indiana Court of Appeals, not deemed waived on procedural grounds. The Indiana Court of Appeals wrongly decided an important question of federal law: whether the procedural requirements of Sections 10 through 12 of the Federal Arbitration Act control a court's review of an arbitration award on public policy grounds at the time of confirmation. The Court should review the lower court's decision on this issue.

II. THE DECISION MISINTERPRETS AND INCORRECTLY EXPANDS THIS COURT'S HOLDING IN *HALL STREET*, WHICH DID NOT ELIMINATE PUBLIC POLICY AS A BASIS TO VACATE AN ARBITRATION AWARD.

The Indiana Court of Appeals also relied upon this Court's opinion in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), to conclude that the trial court was required to confirm the Award because Petitioner did not "demonstrate one of the circumstances in Sections ten and eleven of the FAA." *Sommers v. Sommers*, 898 N.E.2d 1234, 1236 (Ind. Ct. App. 2008). This conclusion ignored Petitioner's essential argument that a public policy challenge to an

arbitration award exists independent of FAA Sections 10 and 11, as explained in prior decisions of this Court. Therefore, the court below erred when it interpreted *Hall Street* as no longer permitting a public policy challenge to an arbitration award and decided an important federal question in conflict with this Court's precedent.

The *Hall Street* case did not involve nor even mention the public policy exception to confirmation of an arbitration award. *Hall Street* does not discuss this Court's prior decisions in *W.R. Grace* or *Misco* that recognized and applied this exception. The narrow issue in *Hall Street* was "whether statutory grounds for prompt vacatur and modification may be supplemented by contract." *Hall Street*, 128 S. Ct. at 1400. The Court answered that question in the negative and held that Sections 10 and 11 provide the "exclusive regimes for the review provided by the statute." *Id.* at 1406. This Court also emphasized that the "must grant" language in Section 9 of the FAA "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies." *Id.* at 1405.

However, the Court qualified its decision in *Hall Street* by noting that "we do not purport to say that [Sections 10 and 11] exclude more searching review based on authority outside the statute as well." *Id.* at 1406. "The FAA is not the only way into court for parties wanting review of arbitration awards" such as "under state statutory or common law." *Id.* This Court emphasized that it was "deciding nothing about other possible avenues for judicial enforcement of arbitration awards." *Id.*

Courts interpreting *Hall Street* have disagreed over whether non-statutory grounds for reviewing arbitration awards remain viable after this decision. Some hold that an arbitration award may be vacated only if a statutory ground enumerated in the FAA is raised and established. *See, e.g., Householder Group v. Caughran,* 576 F. Supp. 2d 796, 800 (E.D. Tex. 2008). Others hold that review of an arbitration award is not necessarily confined to the statutory grounds in FAA Sections 10 or 11. *See Cable Connection, Inc. v. Directv, Inc.*, 190 P.3d 586, 599 & 599 n. 14 (Cal. 2008); *Cypress Communications, Inc. v. Zacharias*, 662 S.E.2d 857, 860 (Ga. Ct. App. 2008).

The context in which the Court decided *Hall Street* does not suggest that the Court intended, by mere implication, to eliminate the public policy exception altogether. It is not reasonable to assume that this Court would discard an important limitation on the enforceability of an arbitration award, and repudiate its own precedent, indirectly and without explanation. That is particularly true in light of the qualifying language in *Hall Street* that the FAA does not exclude more searching review of arbitration awards based on authority outside the statute, including the common law. *Hall Street*, 128 S. Ct. at 1406.

Courts more closely examining *Hall Street* have correctly interpreted the holding as not abolishing the public policy exception. One court noted that this Court expressly acknowledged a difference between "judicial expansion by interpretation" and "private expansion by contract, the latter being the issue in *Hall Street. DMA Intern., Inc. v. Qwest Communications Intern.*, No. 08-CV-00358-WDM-BNB, 2008 WL 4216261, at *4 (D. Colo.

Sept. 12, 2008); *see Hall Street*, 128 S. Ct. at 1404. Thus, the district court in *DMA*, while noting that questions exist whether *Hall Street* had eliminated all "judicially-created" grounds for vacatur, still considered the public policy challenge to the arbitration award on the merits. *DMA*, 2008 WL 4216261, at *7.

Another court has aptly observed that while the *Hall Street* case "calls into question the body of law recognizing public policy as a separate, non-statutory ground for vacatur of arbitration awards, . . . *nothing trumps public policy*." *Williams v. Mexican Restaurant, Inc.*, No. 1:05-CV-841, 2009 WL 531859, at *11 (E.D. Tex. Feb. 27, 2009) (emphasis added). This court noted that "violation of public policy remains a viable avenue for challenging an arbitration award." *Id.* A commentator has concluded that for several reasons *Hall Street's* ruling likely did not eliminate public policy as an independent basis for vacatur, including the reason that "interpreting the FAA to require state courts to enforce awards that violate important state public policies would raise federalism concerns. . . ." Aaron S. Bayer & Joseph M. Gillis, *Arbitration After Hall Street*, FOR THE DEFENSE, November 2008, at 44, 48.

Turning back to *Hall Street*, the text of the decision itself calls for a narrow rather than broad interpretation of its holding. The Court noted that the "FAA is not the only way into court for parties wanting review of arbitration awards; they may contemplate enforcement under state statutory or common law, for example where judicial review of different scope is arguable." *Hall Street*, 128 S.Ct. at 1406.

Judicial review of an arbitration award under the common law was explained previously by this Court in *Misco*. The Court observed that a court's refusal to enforce an arbitrator's award because it is contrary to public policy "is a specific application of the general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Misco*, 484 U.S. at 42, 108 S. Ct. at 373. Therefore, the power of a court to vacate an arbitration award that violates public policy is an exercise of judicial review under the common law that was preserved in *Hall Street*. *See Hall Street*, 128 S. Ct. at 1406.

It must be emphasized that the literal holding in *Hall Street* is that Sections 10 and 11 "respectively provide the FAA's exclusive grounds for expedited vacatur and modification." *Id.* at 1403. Those sections of the FAA do not exclude review outside the statute under the common law. *Id.* at 1406. The authority of a court to vacate an arbitration award that violates public policy is independently derived from the common law, not the language of the FAA. *See Misco*, 484 U.S. at 42, 108 S. Ct. at 373. Put another way, a public policy challenge to an arbitration award is a common law rather than FAA ground for vacating the award.[6]

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[6] Petitioner is not suggesting that *Hall Street* has now removed any limit on the type of challenges that can be brought to vacate an arbitration award entered pursuant to the Federal Arbitration Act. Rather, the point of *Hall Street* is that the Court's decision did not overrule the prior decisions in *W.R. Grace*, *Misco* and the public policy exception to confirmation recognized in those cases.

Therefore, *Hall Street* simply does not apply to the present case and Petitioner's public policy challenge to the Award. The public policy exception to confirmation of an arbitration award survives this Court's decision in *Hall Street* because "nothing trumps public policy." *Williams*, 2008 WL 531859, at *11.

The Indiana Court of Appeals, and some other lower courts, have misapplied the holding in *Hall Street* and merely assumed that all non-statutory grounds for vacatur are no longer available. Courts too have correctly interpreted *Hall Street* and have not expanded the holding to eliminate the public policy exception. Without clarification, lower courts can continue to ignore this Court's admonition in *Hall Street* that the decision was "deciding nothing about other possible avenues for judicial enforcement of arbitration awards" such as judicial review under the common law. *Hall Street*, 128 S. Ct. at 1406.

The post-*Hall Street* viability of the public policy exception to enforcement of arbitration awards is an important question of law affecting the countless number of arbitrations being conducted pursuant to the FAA.

This disagreement and conflict in the decisions of the lower courts over the breadth of the holding in *Hall Street*, as applied to a public policy challenge, should be settled by the Court.

CONCLUSION

For all the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF INDIANA DATED DECEMBER 29, 2008

IN THE COURT OF APPEALS OF INDIANA

No. 49A02-0710-CV-916

BERNICE SOMMERS, AS EXECUTRIX OF THE ESTATE OF SHELDON CHARLES SOMMERS, DECEASED,

Appellant,

vs.

WENDY SOMMERS, MARY LEE SOMMERS GOSZ, and JULIE SOMMERS NEUMAN,

Appellees.

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles J. Deiter, Judge
Cause No. 49D08-0207-PL-1678

December 29, 2008

OPINION

BAILEY, Judge.

Appendix A

Case Summary

Appellant Bernice Sommers, as executrix of the Estate of Sheldon Charles Sommers, (the "Estate") appeals the trial court's confirmation of an arbitration award in favor of Appellees Wendy Sommers, Mary Lee Sommers Gosz and Julie Sommers Neuman (collectively the "Nieces"). We affirm.

Issues

The Estate raises two issues that we restate as:

I. Whether the trial court erred in ordering the parties to arbitration; and

II. Whether the arbitration award should be vacated on grounds that it violates public policy.

Facts and Procedural History

In 2000, Dr. Sheldon Sommers sought the advice of counsel in Indiana as to planning his estate, including his collection of artwork. Dr. Sommers expressed his desire to give the artwork to his Nieces. To avoid issues with gift taxes, his Indiana counsel developed a plan where Dr. Sommers could gift the artwork to the Nieces over a two-year period through an LLC. After the artwork was appraised, the LLC was formed with Dr. Sommers owning most of the capital shares and the Nieces only owning small interests. In 2001, Dr. Sommers executed documents to transfer the artwork to the LLC

and to gift some of the capital shares of the LLC to the Nieces. In January 2002, Dr. Sommers signed the second document effecting gifts of his remaining capital shares in the LLC to the Nieces. The parties agree that Dr. Sommers was competent to complete these transactions. During this time, the Nieces were Dr. Sommers's attorneys-in-fact.

When Dr. Sommers signed the gifting documents, the number of shares to be gifted to each Niece and the corresponding value on the documents were left blank. This was done because the appraisal of the LLC shares was not complete at the time of the execution of the documents. The Indiana counsel explained to Dr. Sommers before he signed the documents that the values would be filled in later according to the values in the appraisal report so as to not incur gift taxes on the transfers. The Indiana counsel filled in the blanks once the March 31, 2002 appraisal report was received.

In early 2002, Dr. Sommers retained new counsel and executed a new will. Dr. Sommers also revoked the Nieces's authority as his attorneys-in-fact. On June 4, 2002, Dr. Sommers filed a Complaint to Turn Over Property, For an Accounting By Powers of Attorneys and Conversion, challenging the validity of the LLC and the gifts of capital stock to his Nieces. On June 26, 2002, the Nieces filed a Motion to Compel Arbitration and For Partial Stay of Proceedings Pending Arbitration pursuant to the arbitration provision in the Operating Agreement of the LLC. Dr. Sommers died on November 1, 2002, and the Estate was substituted as the plaintiff.

Appendix A

On April 19, 2004, the trial court granted the motion for arbitration as to the issues regarding the LLC and gifts of capital shares.

Thereafter the parties jointly selected an Arbitrator. Following the arbitration hearing, the Arbitrator entered an award providing that "Dr. Sommers made a valid irrevocable transfer of the twelve pieces of artwork to the LLC in December 2001" and "thereafter made valid gifts in December 2001 and January 2002 of all of his capital shares of the LLC (both voting and non-voting) to his Nieces." Appellant's Appendix at 623. The arbitration award was issued on September 27, 2005.

On October 27, 2005, the Nieces filed a Verified Motion for Entry of Final Judgment Confirming Arbitration Award, Dismissing Arbitrated Claims, and Awarding Attorneys' Fees. The Estate filed its response on February 3, 2006. After hearings on the motion to confirm on February 28 and August 28, 2006, the trial court issued its order confirming the award, dismissing the arbitrated claims, and awarding the Nieces attorney's fees and expenses. The Estate filed a motion to correct error, which the trial court denied. This appeal ensued.

Appendix A

Discussion and Decision

I. Order of Arbitration

First, the Estate argues that the trial court erred in ordering arbitration because the creation of the LLC was presumptively the result of undue influence because the Nieces were his attorneys-in-fact at the time. The Estate's argument is not timely. "An order compelling arbitration is a final, appealable order if severable from other claims in the lawsuit. Thus, a party may not contest arbitrability for the first time in its petition to vacate an arbitration award." *Angell Enters., Inc. v. Abram & Hawkins Excavating Co.*, 643 N.E.2d 362, 364 (Ind.Ct.App.1994) (internal quotations omitted). The Estate is challenging the arbitrability of its claims for the first time. Therefore, it has waived this argument because it did not appeal the trial court's order compelling arbitration.

II. Arbitration Award as Violation of Public Policy

Second, the Estate contends that the arbitration award should be vacated because it violates public policy. The Nieces argue that the Estate has waived this argument because it did not make a timely motion to vacate, modify or correct the arbitration award according to the Federal Arbitration Act. We agree.

Under Section 11.01 of the Operating Agreement of the LLC, it provides that arbitration of any controversy among the members "shall be governed by

the United States Arbitration Act, 9 U.S.C. Sections 1-16[.]" Appellant's Appendix at 85. Where a party seeks to vacate, modify or correct an arbitration award, Section twelve of the Federal Arbitration Act ("FAA") mandates that the party serve a motion to vacate, modify or correct upon the adverse party within three months after the award is filed or delivered. 9 U.S.C. § 12. Sections ten and eleven provide the grounds for such relief. *See* 9 U.S.C. §§ 10-11. Thus, if a party is dissatisfied with the arbitration award, he must file a motion to vacate, modify or correct within three months after the award is filed or delivered *and* establish one or more of the circumstances outlined in Sections ten and eleven. Here, the Estate never filed such a motion. Rather, the Nieces filed a motion to confirm the arbitration award.

Section nine of the FAA provides that upon a motion to confirm an arbitration award, "the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9 (emphasis added). The U.S. Supreme Court recently noted that "[t]here is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies." *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, __ U.S. __, __, 128 S.Ct. 1396, 1405, 170 L.Ed.2d 254 (2008). Here, because the Estate failed to file the requisite motion and demonstrate one of the circumstances in Sections ten and eleven of the FAA, the trial court was required to confirm the award.

The Estate argues that failure to file a motion to vacate, modify or correct does not prohibit them from defending a motion to confirm with one of the prescribed exceptions in Sections ten and eleven. Federal caselaw dictates otherwise. In *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, a panel of the Eleventh Circuit followed the lead of the Second Circuit, holding that a party's failure to move to vacate, modify or correct an arbitration award within the three-month window provided by Section twelve precludes that party from later seeking such relief when opposing a motion to confirm the award. *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 853 (11th Cir.1989). The *Cullen* Court also noted that other Circuit Courts of Appeal arrived at the same conclusion in analogous scenarios involving state arbitration statutes that contain similar three-month statutes of limitation. *Id.* at 853-54 (including *Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1025 (7th Cir.1980) (Indiana statute)). Therefore, because the Estate failed to file a motion to vacate, modify or correct within the prescribed time it has waived these arguments in defending the Nieces's motion to confirm. The trial court properly confirmed the arbitration award.

Affirmed.

RILEY, J., and BROWN, J., concur.

APPENDIX B — FINAL JUDGMENT OF THE STATE OF INDIANA, COUNTY OF MARION SUPERIOR COURT, PROBATE DIVISION DATED AND FILED APRIL 17, 2007

STATE OF INDIANA

COUNTY OF MARION

MARION SUPERIOR COURT
PROBATE DIVISION
CAUSE NO. 49D080207PL001678

BERNICE SOMMERS, AS EXECUTRIX OF THE ESTATE OF SHELDON CHARLES SOMMERS, Deceased,

Plaintiff,

Vs

WENDY SOMMERS, MARY LEE SOMMERS GOSZ, and JULIE SOMMERS NEUMAN,

Defendants.

FINAL JUDGMENT CONFIRMING ARBITRATION AWARD, DISMISSING ARBITRATED CLAIMS, AND AWARDING ATTORNEY FEES

On 2/28/06 Plaintiff appeared by counsel, Norman T. Funk. Defendant Wendy Sommers appeared in person and by counsel, Jarrell B. Hammond. Mary Lee

Appendix B

Sommers Gosz and Julie Sommers Neuman appeared by counsel, Jarrell B. Hammond. Evidence was heard on Defendants' *Verified Motion for Entry of Final Judgment Confirming Arbitration Award, Dismissing Arbitrated claims and Awarding Attorneys' Fees.* On 8/28/06 the parties appeared by counsel and argument was heard on *Plaintiff's Submission of Additional Evidence and Legal Authority.* The Court, having taken the matter under advisement, finds that:

1. Article Eleven (including both Section 11.01 and Section 11.02) of *The Operating Agreement of Sommers Art Investors, LLC*, is valid and binding upon the parties.

2. Pursuant to Article Eleven, Defendants are entitled to recover all reasonable attorneys' fees incurred in relation to those claims in Plaintiff's *Amended Complaint* which were arbitrated pursuant to this court's *Order for Arbitration.*

IT IS THEREFORE ORDERED THAT:

1. Pursuant to FAA, Section 9 (9 U.S.C. Section 9), the Final Award issued by Arbitrator Edward W. Harris, III, on September 27, 2005, on the claims referred to arbitration in this Court's *Order for Arbitration and Stay of Proceeding as to Certain Issues and Order Setting Pretrial Conference*, entered on April 19, 2004, is hereby confirmed, and this Entry shall serve as a Final Judgment confirming the arbitration award;

Appendix B

2. The following claims in Plaintiffs *Amended Complaint* , filed November 1, 2002, that were arbitrated pursuant to this Court's *Order for Arbitration* be, and are hereby, dismissed with prejudice. Specifically, those claims are: (a) Count V; (b) the portion of Count VI that relates to the twelve items of artwork transferred by Dr. Sheldon Charles Sommers to Sommers Art Investors, LLC; and (c) the portion of Count I that relates to Count V and to the relevant portion of Count VI;

3. Judgment be, and is hereby, entered in favor of Defendants and against Plaintiff for attorneys' fees in the sum of $240,000.00 plus $26,744.63 for ancillary expenses.

4. There is no just reason for delay and this order shall be entered as a final judgment as to those claims adjudicated herein;

5. A pretrial conference as to those claims not adjudicated herein is set for 7-30-07 at 3:00 pm.

s/ C.J. Deiter
Judge

4/17/07

APPENDIX C — FINAL AWARD OF THE CPR INSTITUTE FOR DISPUTE RESOLUTION NON-ADMINISTERED ARBITRATION DATED SEPTEMBER 27, 2005

CPR INSTITUTE FOR DISPUTE RESOLUTION NON-ADMINISTERED ARBITRATION

IN RE PRIVATE ARBITRATION PURSUANT TO OPERATING AGREEMENT OF SOMMERS ART INVESTORS, LLC, DATED DEC. 24, 2001

BERNICE SOMMERS, Executrix of the Estate Of Sheldon Charles Sommers, deceased,

Plaintiff/Respondent,

vs.

MARY LEE SOMMERS GOSZ, WENDY SOMMERS, and JULIE SOMMERS NEUMAN,

Defendants/Petitioners.

FINAL AWARD

An evidentiary hearing was conducted in this matter on July 26 through July 29, 2005, pursuant to the CPR Rules for Non-Administered Arbitration. This final award is issued pursuant to those rules.

The issue before the arbitrator is whether Dr. Sheldon Charles Sommers ("Dr. Sommers") made a valid lifetime gift of twelve pieces of artwork to his

Nieces, defendants/petitioners Mary Lee Sommers Gosz, Wendy Sommers and Julie Sommers Neuman (the "Nieces"). The alleged gift took place in stages: the formation of a limited liability company known as Sommers Art Investors, LLC (the "LLC"), the transfer of Dr. Sommers' ownership interest in the artwork to the LLC in late December 2001, and the transfer of Dr. Sommers' ownership interest in the LLC by gifts to his Nieces in late December 2001 and in early January 2002. Dr. Sommers was represented by counsel with respect to the above transactions, the Indianapolis law firm of Barnes & Thornburg LLP, and particularly Kristin Fruehwald ("Fruehwald") of that firm.

The documentation of the above transactions reflects that the transfers were in fact made (see discussion *infra* regarding blanks in the documents when they were signed by Dr. Sommers). However, the gifts are challenged in several respects. These challenges were first raised by Dr. Sommers before he died on November 1, 2002, and are now being pursued by the Executrix of his estate, Bernice Sommers, Dr. Sommers' widow. At the time of the alleged gifts, Bernice Sommers was Dr. Sommers' former wife. They remarried on June 23, 2002.

At the time of the alleged gifts, the Nieces were Dr. Sommers' attorneys-in-fact and therefore his fiduciaries. They did not use their fiduciary powers in any of the transactions relating to the alleged gifts.

Appendix C

Interesting questions have been raised whether under these circumstances there is a presumption of fraud (including constructive fraud) or undue influence by the Nieces, whether that presumption is rebuttable, and what standard of proof is necessary to rebut the presumption.[1] The parties agree that Indiana law applies to this proceeding. The arbitrator will presume that the Indiana Supreme Court would follow rulings of the Indiana Court of Appeals, rather than contrary rulings in other states, that there is a presumption of fraud or undue influence even if the Nieces did not use their fiduciary powers in connection with the challenged transactions, and that the burden is on the Nieces to rebut the presumption. The question then is the standard of proof the Nieces must meet to rebut the presumption. The Nieces claim the standard is "clear and convincing" evidence while the Executrix argues that a higher standard of "clear and unequivocal" evidence should be applied. The arbitrator concludes that the proper standard is "clear and convincing," but that even if a "clear and unequivocal" test were employed, the outcome would be the same because "unequivocal" cannot be so high a standard as to require that there is no evidence in the record from which a contrary inference could be drawn.

There was lengthy testimony from counsel from the law firm of Barnes & Thornburg, particularly from

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1. Counsel for both sides made excellent presentations, both of the evidence and of the legal arguments supporting their clients' positions.

Fruehwald, and also from her colleague, Randy Kaltenmark ("Kaltenmark"). Fruehwald is a well-regarded estate planning attorney, to whom Dr. Sommers came for advice beginning in 2000. She testified that she and he had numerous discussions about his estate plan, and particularly his artwork, and that his plan for the artwork evolved. She testified that by the Summer of 2001, Dr. Sommers (who was at that point of time divorced from Bernice Sommers) desired to give the artwork to the Nieces. Fruehwald saw various tax problems with a direct gift so she and Kaltenmark developed a plan of making the gifts over two years through the LLC, both to save a considerable sum in taxes and also to provide a better structure for how the artwork would be dealt with following the gifts. Fruehwald requested an appraisal of the artwork which was completed in the Fall of 2001.

After the appraisal was completed, the LLC was formed. Dr, Sommers initially owned most of the capital shares of the LLC (both voting and non-voting), with the Nieces owning small interests. The Nieces had input on terms of the LLC, but suggested no changes that are relevant to this proceeding. The Nieces were not represented by counsel, and Fruehwald emphatically testified without contradiction that she represented Dr. Sommers, not the Nieces. After documents were prepared by Barnes & Thornburg to effect the formation of the LLC, the transfer of the artwork by Dr. Sommers to the LLC, and the 2001 gift of Dr. Sommers' capital shares in the LLC to the Nieces, Fruehwald had two lengthy meetings with Dr. Sommers. She testified that

she told him the overall appraised value of the artwork, that the artwork would initially be transferred to the LLC, that he then in December 2001 and January 2002 would gift his interest in the LLC to the Nieces, and that following the gifts the Nieces would effectively own the artwork through the LLC. Fruehwald testified that Dr. Sommers understood all of this,[2] and that he expressed his clear intent to gift the artwork to the Nieces in accordance with the above plan. He thereupon signed the initial gifting documents, transferring the artwork to the LLC, and transferring some of his capital shares in the LLC to the Nieces. In January 2002, Kaltenmark met with Dr. Sommers and explained to Dr. Sommers that he had brought documents whereby Dr. Sommers would gift his remaining capital shares in the LLC to his Nieces. Dr. Sommers thereupon executed the documents effecting this gift. The parties are in agreement that Dr. Sommers was competent to enter into the above transactions.

The alleged gifts must be viewed as of the time they were made, not as of what Dr. Sommers would have done at some prior or future time. The unusual fact in this case, and undoubtedly a source of great frustration to Bernice Sommers, is that at the time of the alleged gifts

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2. There was testimony that Dr. Sommers did not understand all aspects of the LLC, and had not read all of the documentation of the LLC. The arbitrator concludes that it was not necessary that Dr. Sommers understand every aspect of the LLC (which is a complicated legal device) as long as he understood the essential nature of the transaction into which he was entering.

she was Dr. Sommers' former wife, and then months after the alleged gifts were made she remarried him. It is quite possible that within several months after he made the gift, Dr. Sommers had a change of heart and wanted the artwork to go to Bernice Sommers. Indeed, he obtained new counsel and filed litigation seeking to get back the artwork. But the issue before the arbitrator is whether at the time of the alleged gifts Dr. Sommers knew what he was doing and intended to do it.

The arbitrator concludes that Dr. Sommers did know that he was in effect gifting the artwork to the Nieces, and that he intended to do what is reflected in the gifting documents. The arbitrator credits the testimony of Fruehwald and Kaltenmark as to the events of December 2001 and January 2002, which was not directly contradicted. The testimony of Fruehwald is particularly telling. Indeed, the arbitrator would have to conclude that Fruehwald either breached her fiduciary duty to Dr. Sommers or was suffering from an extreme error in memory to conclude that Dr. Sommers lacked the necessary knowledge or intent, and there is no basis in the record for such a conclusion. Dr. Sommers was represented by counsel, he told his counsel what he wanted to do, and his counsel did so. The arbitrator simply cannot conclude otherwise.

There is no evidence in the record that the Nieces committed actual fraud on Dr. Sommers. Nor is there any significant evidence in the record that they tried unduly to influence him to give them the artwork. There is no direct evidence in the record that they even asked

him to do so. Nor is there evidence that the Nieces misrepresented any material fact to Dr. Sommers, or evidence that they were silent when they had a duty to speak. Dr. Sommers was represented by counsel with respect to these transactions, and it was entirely appropriate for the Nieces to allow him to rely on advice of his counsel. In fact, given the fact that they would benefit from the proposed transactions, that is what they should have done. There is no evidence Dr. Sommers relied on any statements by the Nieces in deciding to make the gift, that they acted in bad faith, or that they in any way took advantage of their positions of trust. Nor was there anything unfair or inequitable about the gifts, which were reflective of Dr. Sommers' intent. The evidence that there was no fraud (including constructive fraud) or undue influence by the Nieces is clear and convincing.

The final issue involves blanks in the gifting documents when Dr. Sommers signed them. Specifically, when Dr. Sommers gifted capital shares in the LLC in December 2001 and January 2002, on each occasion the number of shares being gifted and the value of these shares were left blank. Fruehwald explained that this was because an appraisal had not yet been received of the value of the LLC shares, and therefore it was not known for gift tax purposes how many shares should be gifted in 2001 and how many should be gifted in 2002. When these amounts were known following receipt of a March 31, 2002 appraisal report, Barnes & Thornburg filled in the blanks. This is a plausible explanation. The issue is whether the gifts were complete and therefore

valid, notwithstanding the fact that the blanks were later filled in.

Fruehwald testified that she explained to Dr. Sommers that the blanks would be filled in when the appraisal of the LLC was received and Barnes & Thornburg knew what numbers should be put in the blanks to minimize gift tax. She testified that Dr. Sommers understood this, and he gave her the authority (implied if not express) to fill in the blanks consistent with her explanation to him. While Dr. Sommers later obtained new counsel, he never revoked this authority to fill in the blanks. It is significant that Dr. Sommers gave the authority to fill in the blanks not to any of the recipients of the gifts, but to his own counsel. The arbitrator finds that Barnes & Thornburg had authority to fill in the blanks, and that the gifts were effective as of the date Dr. Sommers signed the gifting documents.

The arbitrator therefore concludes and finds: (1) that Dr. Sommers made a valid irrevocable transfer of the twelve pieces of artwork to the LLC in December 2001; and (2) that he thereafter made valid gifts in December 2001 and January 2002 of all his capital shares of the LLC (both voting and non-voting) to his Nieces.

DATED: September 27, 2005

s/ Edward W. Harris III
Edward W. Harris III, Arbitrator

APPENDIX D — ORDER OF THE SUPREME COURT, COURT OF APPEALS, AND TAX COURT DENYING PETITION TO TRANSFER OF JURISDICTION DATED APRIL 23, 2009

CLERK
SUPREME COURT, COURT OF APPEALS, AND TAX COURT
STATE OF INDIANA
217 State House, Indianapolis, IN 46204
317-232-1930 • Fax 317-232-8365

ALAN IRVIN
CHASE TOWER, SUITE 3300
111 MONUMENT CIRCLE
INDIANAPOLIS, IN 46204

Cause Number

49A02-0710-CV-00916
Lower Court Number:
49D080207PL1678

SOMMERS, BERNICE ET AL.-V- SOMMERS, WENDY ET AL.

You are hereby notified that the SUPREME COURT has on this day 4/23/09

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED

Appendix D

PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court,
this 23RD day of APRIL, 2009

s/ Kevin S. Smith
Clerk, Supreme Court,
Court of Appeals
and Tax Court